No. 75-483

Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1975

BERENTJE C. M. POHLMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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After a jury trial in the United States District Court for the District of North Dakota, petitioner was convicted on three counts of willfully failing to file individual income tax returns for the years 1968, 1969, and 1970, in violation of 26 U.S.C. 7203. The court fined petitioner $1,500 and placed her on probation for two years. Initially, the court of appeals reversed the conviction on the ground that the instruction on willfulness was erroneous (Pet. App. A1-A9). However, on rehearing *en banc*, the decision of the panel was reversed, with three judges dissenting (Pet. App. B1-B14). The contentions raised in the petition are that the evidence was insufficient to support the verdict and that the jury was improperly instructed on the element of willfulness.

The pertinent facts are as follows: Early in October, 1972, a revenue agent called upon petitioner and advised her that the Internal Revenue Service had no record of

her having filed income tax returns for 1968 through 1971. Petitioner admitted that she had not filed the returns, and that she was an attorney who often prepared income tax returns for other persons (Tr. 23).[1] A few days later, petitioner advised the agent that she would have her delinquent returns completed by October 11, 1972, and she submitted them to the agent on that date (Tr. 24-25).

Upon auditing the returns, the agents found that petitioner had received gross income of approximately the amounts there shown: $22,890 for 1968, $19,695 for 1969, and $28,891 for 1970 (Tr. 151-154). Petitioner advised the agents during the investigation that she had not filed the returns because she did not have the money to pay the tax, but admitted that she was aware of her responsibility to file and was aware that she could have filed the returns without paying the tax (Tr. 130).

At trial, petitioner testified that she had been practicing law since 1955 (Tr. 188); that she had prepared thousands of tax returns for other persons and was fully aware of the filing requirements (Tr. 189); and that she had admitted to an Internal Revenue agent late in 1972 that she had not filed returns for 1968 through 1970 (Tr. 190-191). Although petitioner claimed at trial for the first time that she had filed all three returns on April 21, 1971 (Tr. 183-185) and that accompanying them was her check for $4,127.93 (Tr. 185), she subsequently admitted that she had no such amount in the bank at that time and that the check was never presented for payment (Tr. 185-186, 208). Petitioner further admitted that during a conference with Internal Revenue officials in St. Paul, Minnesota, in 1973, she did not claim that she

[1]"Tr." refers to the trial transcript.

had filed the returns in 1971 (Tr. 203-207). Prior to October 11, 1972, the Internal Revenue Service had no record of petitioner's having filed income tax returns for 1968 through 1970 (Tr. 11).

1. As the foregoing facts show, there was ample evidence that petitioner failed to file returns by April 15 of each year following the taxable year, as the law required, and that her failure was willful. Indeed, even if her defense that she had filed the returns on April 21, 1971, were accepted by the jury, it could still have found her guilty on all counts, for even by her account none of the returns was timely filed.

2. Petitioner further argues (Pet. 15-19) that the trial court improperly instructed the jury with respect to the element of willfulness. The court charged the jury as follows (Pet. 15-16):

> The specific intent of willfulness is an essential element of the crime of failure to file an income tax return. The word "willfully" used in connection with this offense means deliberately, and intentionally, and without justifiable excuse, or with the wrongful purpose of deliberately intending not to file a return which defendant knew she should have filed, in order to prevent the Government from knowing the extent of, and knowing the facts material to, the determination of her tax liability.
>
> Defendant's conduct is not "willful" if she acted through negligence, inadvertence, or mistake, or due to her good faith misunderstanding of the requirements of the law. It should be pointed out, however, that disagreement with the law is not a defense. It is the duty of all citizens to obey the law whether they agree with it or not.

This instruction is in substantial accord with *United States* v. *Bishop*, 412 U.S. 346, 360-361, which defined willfulness in terms of a "voluntary, intentional violation of a known legal duty." It is unnecessary for the trial judge to formulate the requirement in terms of "bad purpose" or "evil motive." *Cooley* v. *United States*, 501 F. 2d 1249, 1252-1253 (C.A. 9), certiorari denied, 419 U.S. 1123; *United States* v. *Hawk*, 497 F. 2d 365 (C.A. 9), certiorari denied, 419 U.S. 838.

United States v. *Murdock*, 290 U.S. 389, relied upon by petitioner (Pet. 17-18), does not conflict with the decision below. There, the defendant was charged with willful failure to supply information requested by the Internal Revenue Service. The Court held that the criminal sanction did not apply to one whose refusal to give requested information was based upon his *bona fide*, though mistaken, understanding of his constitutional privilege against self-incrimination. While the Court in *Murdock* formulated the requirement of willfulness as "bad faith or evil intent" (290 U.S. at 398), nothing in that case requires that the trial court employ those precise words in its instructions to the jury.

Indeed, as the Court pointed out in *Bishop* (412 U.S. at 360-361), the *Murdock* definition of willfulness is synonymous with the "voluntary, intentional violation of a known legal duty" standard approved in *Bishop* and the trial court's instructions that "willfully" means "with the wrongful purpose of deliberately intending not to file a return which defendant knew she should have filed ***." Both formulations are designed to "separate the purposeful tax violator from the well-meaning, but easily confused, mass of taxpayers" (412 U.S. at 361). See also *United States* v. *Matosky*, 421 F. 2d 410, 412 (C.A. 7),

certiorari denied, 398 U.S. 904; *Lumetta* v. *United States*, 362 F. 2d 644 (C.A. 8).[2]

3. Petitioner further argues (Pet. 11-12) that the revenue agents should have advised her of her constitutional rights. But the interview in question was conducted by a revenue agent engaged in a routine civil audit and not a special agent whose function is to investigate criminal violations of the tax laws. Thus, the issue presented in *Beckwith* v. *United States*, No. 74-1243, of whether a special agent is required to give such warnings prior to a noncustodial interview with a taxpayer under investigation, is not raised in this case.

4. Petitioner's further contention (Pet. 12-14) that Government Exhibits 1, 2 and 3 (the income tax returns for the years in question) were copies rather than the originals allegedly prepared and mailed by petitioner in April, 1971, is frivolous. The documents in question were originals and not copies (Tr. 28, 30). In any event, there was sufficient evidence for the jury to conclude that petitioner had not prepared or mailed her returns in 1971. As for the asserted conflict in the evidence as to when the returns were filed (Pet. 13), the Internal Revenue Service employee from the Service Center in Ogden, Utah, did not testify that the returns were filed in that city in October, 1972. Thus, his testimony was not inconsistent with the evidence that petitioner filed her returns in Fargo, North Dakota, at that time.

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[2]Petitioner also argues (Pet. 15-17) that willfulness must be shown as of the time of the alleged crimes. But that proposition is implicit in the trial court's instructions. Under those instructions, there was ample evidence for the jury to have found that petitioner deliberately chose not to file returns which she knew the law required her to file during the prosecution years, until the time of the revenue agent's first visit late in 1972.

5. Finally, petitioner challenges (Pet. 19-21) the statement of the prosecutor in his summation that at her conference with the Internal Revenue Service in St. Paul in 1973 petitioner stated that "her defense would be because of financial problems and also they couldn't prove willfulness and so forth." However, the record fully supports the correctness of the prosecutor's statement (see Tr. 204-205, 206).

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

DECEMBER 1975.

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